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8 UNITED STATES DISTRICT COURT
9 SOUTHERN DISTRICT OF CALIFORNIA
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11 PETER ROSS,

12 Plaintiff,

13 v.

14 P.J. PIZZA SAN DIEGO, LLC., et al,

15 Defendants.
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Case No.: 3:16-cv-02330-L-JMA

**ORDER DENYING DEFENDANTS'
MOTION [Doc. 5] TO COMPEL
ARBITRATION**

18 Pending before the Court is Defendants P.J. Pizza San Diego, LLC and P.J. Pizza
19 Holdings, LLC's ("Defendants") motion to compel Plaintiff Peter Ross ("Plaintiff") to
20 submit his claims to arbitration on an individual basis. The Court decides the matter on
21 the papers submitted and without oral argument. See Civ. L. R. 7.1(d.1). For the reasons
22 stated below, the Court **DENIES** Defendants' Motion.

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1 **I. BACKGROUND**

2 Defendants own and operate a chain of Papa John's Pizza franchises in the San
3 Diego area. Plaintiff was a delivery driver for Defendants. As a condition of
4 employment, Plaintiff signed an Arbitration Agreement requiring arbitration of any
5 claims between Plaintiff and Defendants. (Arbitration Agreement [Doc. 5-3 Ex. 2].) The
6 Arbitration Agreement also contains a clause ("Class Action Waiver") which, if valid,
7 would deny each side the right to file a class action claim against the other, whether in
8 court, arbitration, or otherwise.

9 On November 30, 2016, Plaintiff filed an amended complaint against Defendants
10 alleging various putative class and collective action claims stemming from violations of
11 California and federal labor laws. (See FAC [Doc. 3].) Defendants now move to compel
12 Plaintiff to submit his claims to arbitration on an individual basis. (See Mot. [Doc. 5].)
13 Plaintiff opposes. (See Opp'n [Doc. 16].)

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15 **II. LEGAL STANDARD**

16 There is no dispute as to the fact that the Federal Arbitration Act ("FAA") governs
17 here. Under the FAA, a Court need consider only two questions to determine whether to
18 compel arbitration: (1) is there a valid agreement to arbitrate? And, if so, (2) does the
19 agreement cover the matter in dispute? *Chiron Corp. v. Ortho Diagnostic Systems, Inc.*,
20 207 F.3d 1126, 1130 (9th Cir. 2000). The Arbitration Agreement clearly covers the
21 matters in dispute here. Accordingly, the Court need only consider whether the
22 Arbitration Agreement is valid.

23 An agreement to arbitrate is "valid, irrevocable, and enforceable, save upon such
24 grounds as exist at law or in equity for the revocation of any contract." 9 U.S.C. § 2.
25 Under California law, the elements of a valid contract are (1) parties capable of
26 contracting; (2) mutual consent; (3) a lawful object; and (4) consideration. Cal. Civ. Code
27 § 1550. However, a court will not enforce an otherwise valid contract if there exists a
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1 viable defense, such as illegality. 1 Witkin, Summary 10th (2005) Contracts, § 331, p.
2 365.

3 4 **III. DISCUSSION**

5 Plaintiff argues that the Arbitration Agreement is illegal, and therefore invalid,
6 because the Class Action Waiver violates the National Labor Relations Act (“NLRA”).
7 Section 7 of the NLRA provides that

8 [e]mployees shall have the right to self-organization, to form, join, or assist
9 labor organizations, to bargain collectively through representatives of their
10 own choosing, and to engage in other concerted activities for the purpose of
collective bargaining or other mutual aid or protection. . .”

11 29 U.S.C. § 157. Plaintiff argues that this language creates a federal substantive right on
12 behalf of employees to join together in class action litigation to prosecute employment
13 disputes. In support, Plaintiff cites *Morris v. Ernst & Young, LLP*, 834 F.3d 975 (9th Cir.
14 2016), *cert. granted*, 85 U.S.L.W. 3341 (U.S. Jan. 13, 2017) (No. 16–300).

15 In *Morris*, Plaintiff Morris filed class and collective action claims against his
16 employer Ernst & Young alleging that it violated the Fair Labor Standards Act and
17 California labor laws by misclassifying him and others similarly situated as exempt
18 employees to avoid paying them overtime. *Morris*, 834 F.3d at 979. Because Morris had
19 signed an arbitration agreement purporting to require him to bring all legal claims against
20 Ernst & Young via arbitration as an individual and in separate proceedings, Ernst &
21 Young moved to compel arbitration. *Id.* Morris opposed by arguing that the arbitration
22 agreement, by requiring only individual prosecution of employment claims, violated his
23 federal substantive rights under the NLRA to engage in “concerted action” against his
24 employer. *Id.* at 979–80. The Ninth Circuit agreed. *Id.* at 990.

25 The parties are in disagreement as to whether the Ninth Circuit’s decision in
26 *Morris* compels the finding that the Class Action Waiver at issue here violates the
27 NLRA. Defendants present two arguments as to why *Morris* does not compel such a
28 holding. First, Defendants seem to argue that *Morris* is not controlling because (1) other

1 federal circuits have held that the Fair Labor Standards Act does not create a substantive
2 right to concerted action and (2) the Supreme Court has granted *certiorari* on the *Morris*
3 decision. The main problem with this argument is that, regardless of what other circuit
4 courts may have decided on an issue, it is hornbook law that this Court is bound by a
5 published Ninth Circuit decision unless and until it is overturned by Congress, the Ninth
6 Circuit, or the Supreme Court. *See United States v. Frank*, 956 F.2d 872, 882 (9th Cir.
7 1991).

8 Next, Defendants argue that the present case is distinguishable from *Morris*
9 because the Class Action Waiver at issue here does not ban all forms of “concerted
10 action.” Rather, under Defendants’ interpretation, the Class Action Waiver only prohibits
11 Plaintiff from bringing class or collective actions. Thus, unlike the agreement in *Morris*,
12 the Class Action Waiver does not prohibit Plaintiff from joining together with other
13 employees and bringing a joint, multi-plaintiff action. Because the Class Action Waiver
14 permits such a joint action, Defendants argue it does not prohibit all “concerted action”
15 and therefore does not offend the NLRA.

16 The Court disagrees. Court’s must give considerable deference to the National
17 Labor Relations Board’s (“the Board”) reasonable interpretations as to the scope of the
18 NLRA. *N.L.R.B. v. City Disposal Sys. Inc.*, 465 U.S. 822, 829–30 (1984). The Board has
19 articulated that an employer violates Section 7 of the NLRA


20 when it requires employees covered by the Act, as a condition of their
21 employment, to sign an agreement that precludes them from filing joint,
22 class, *or* collective claims addressing their wages, hours or other working
23 conditions against the employer in any forum, arbitral or judicial.

24 *Horton 1*, 357 NLRB No. 184, slip op. at 1 (emphasis added). Under this interpretation,
25 to trigger Section 7 of the NLRA, it is not necessary that a waiver prohibits joint, class,
26 *and* collective claims. Rather, it is sufficient if such a waiver prohibits any one of these
27 three types of concerted actions. In *Morris*, the Ninth Circuit expressly ratified *Horton*
28 *I*’s interpretation of Section 7 of the NLRA. *Morris*, 834 F.3d at 983 (stating “the
Board’s interpretation of § 7 and § 8 is correct.”).

1 Here, there is no dispute that the Class Action Waiver, which Defendants required
2 Plaintiff to sign as a condition of employment, would preclude Plaintiff from engaging in
3 at least one of the three types of concerted actions the NLRA protects. For this reason,
4 the Class Action Waiver is invalid and the Court **DENIES** Defendants' motion to compel
5 individual arbitration of Plaintiff's class and collective action claims.

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7 **IT IS SO ORDERED.**

8 Dated: May 11, 2017

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11 Hon. M. James Lorenz
12 United States District Judge
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